SUPREME COURT, U. S.

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No. 742

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD SUTTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD SIMON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

The Solicitor General, on behalf of the United States, appeals from that part of the judgment of the United States District Court for the Western District of Wisconsin which dismissed count 1 of the indictment in this case, charging a violation of 26 U.S.C. 4742(a).

OPINIONS BELOW

The opinion of the district court dated June 30, 1969, dismissing the indictment (Appendix, *infra*, pp. 6–13) and the opinion dated July 16, 1969, denying reconsideration (Appendix, *infra*, pp. 14–20) are not reported.

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JURISDICTION

The order of the district court dismissing the indictment on the ground that appellee's assertion of his privilege against self-incrimination was a complete defense to the prosecution was entered on June 30, 1969. The government's motion for reconsideration was denied on July 16, 1969. The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes a direct appeal from a decision sustaining a motion in bar, when the defendant has not been put in jeopardy. See *United States* v. *Covington*, 385 U.S. 57; *United States* v. *Wilson*, 384 U.S. 141.

QUESTION PRESENTED

Whether the assertion of the privilege against self-incrimination provides a complete defense to a charge of transferring marihuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a).

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. 4742(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under section 4751 to 4775, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Other pertinent statutes and regulations are set forth in the Brief for the United States in *Buie* v. *United States*, No. 271, this Term.

STATEMENT

A two-count indictment filed in May 1967 in the United States District Court for the Western District of Wisconsin charged appellee with transferring 668 grams of marihuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a) (count 1), and facilitating the transportation of the marihuana as a transferee, in violation of 26 U.S.C. 4744(a) (count 2). Prior to trial appellee moved to dismiss the indictment on the ground that his assertion of the privilege against self-incrimination was a complete defense to both counts. On May 19, 1969, this Court, in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, sustained appellee's position as to count 2, charging a violation of 26 U.S.C. 4744(a). On June 30, the district court dismissed both counts of the indictment. The court held that since the transferor's identity is necessarily disclosed on the order form he has a self-incrimination defense to a prosecution under Section 4742(a) because compliance with the statute would place him in a position of "requiring that the transferee enter information on the form which will incriminate [him]" (Appendix, *infra*, p. 12).[1] In denying the government's motion for reconsideration as to count 1, the district court ex-

[1] The court determined that the identification of the transferor on the marihuana order form distinguished this case from a prosecution under the narcotics laws (see *United States* v. *Minor*, 398 F. 2d 511 (C.A. 2), certiorari granted, No. 189, this Term, 395 U.S. 932) since the statutory scheme of the Harrison Narcotics Act does not require the transferee to disclose the transferor's name and address in order to obtain the required form (*ibid*).

pressly disagreed with the Second Circuit's decision in *United States* v. *Buie*, 407 F. 2d 905 (C.A. 2), certiorari granted, No. 271, this Term, 395 U.S. 976. The court reasserted its position that the fact that the *transferee* furnishes the information to the government is not determinative because, as the court viewed the operation of the Marihuana Tax Act, it "requires the transferor to see to it" that the damaging information is on the order form (Appendix, *infra*, p. 18).

THE QUESTION IS SUBSTANTIAL

The question presented by this case is identical in all material respects to the question which this Court agreed to consider on writ of certiorari in *Buie* v. *United States*, No. 271, this Term, which has been set for argument in the October Session.[2] On the government's petition for reconsideration in the present case, the district court expressly rejected the authority of the Second Circuit's decision in *Buie* that the order form requirement in 26 U.S.C. 4742(a) does not violate a transferor's privilege against self-incrimination.

Unlike the statutory provisions involved in *Leary* and *Covington*, *supra*, compliance with Section 4742 (a) does not require a transferor of marihuana himself to disclose any information at all; the statute merely forbids him from making a transfer unless the transferee produces an order form which he has obtained from the Secretary of the Treasury. As we argue fully in our brief in *Buie*, on which we rely

[2] This case, in which the self-incrimination defense was sustained as a ground for dismissal of the indictment, bears the same relationship to *Buie* v. *United States* as *United States* v. *Covington* bore to *Leary* v. *United States*.

here, the fact that the transferee must disclose the name and address of the prospective transferor in order to secure an order form does not impose any obligation of self-incrimination on the transferor. Nothing in the statute requires the transferor to supply that information, and there is no basis for the assumption which underlies the position of the district court in this case and of the petitioner in *Buie*—that such information can be obtained only from the transferor.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted and judgment should be entered in accordance with this Court's disposition in *Buie* v. *United States*, *supra*.

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OCTOBER 1969.

APPENDIX A

In the United States District Court for the Western District of Wisconsin

No. 67–CR–45

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD SIMON, DEFENDANT

[Filed June 30, 1969, John R. Adams, clerk]

Opinion and Order

Defendant has filed a motion to dismiss both counts of an indictment charging him with violations of the Marihuana Tax Act, 26 U.S.C. § 4741 et seq. Defendant contends that the timely assertion of his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States is a complete defense to the charges in the indictment.

Count I of the indictment charges that defendant transferred a quantity of marihuana not pursuant to a written order on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, in violation of 26 U.S.C. § 4742(a). Count II of the indictment charges that defendant was a transferee of and transported and facilitated the transfer of a quantity of marihuana without having paid the tax imposed by 26 U.S.C. § 4741(a), in violation of 26 U.S.C. § 4744(a).

In its consideration of defendant's motion to dismiss the indictment the court has been provided with supporting and opposing briefs and oral argument has been heard.

Subsequent to the filing of briefs and the hearing of oral argument, the Supreme Court of the United States held in *Leary* v. *United States,* 37 U.S.L.W. 4397 (U.S., May 19, 1969), and *United States* v. *Covington,* 37 U.S.L.W. 4412 (U.S., May 19, 1969), that the timely assertion of the privilege against self-incrimination provides a complete defense to a prosecution for violation of section 4744(a). A motion to dismiss the indictment pursuant to Rule 12(b)(1), Federal Rules of Criminal Procedure, constitutes a a timely assertion of the privilege in such a case. *United States* v. *Covington, supra.* Hence the defendant's motion to dismiss Count II of the indictment must be granted.

With respect to Count I of the indictment, the government contends that a prosecution for violation of section 4742(a) is unaffected by *Leary* v. *United States, supra,* and *United States* v. *Covington, supra.* Defendant contends that these decisions are controlling with respect to Count I as well as Count II of the indictment.

In order to evaluate these contentions it is necessary to consider the relationship between section 4742(a) and section 4744(a) with regard to the privilege against self-incrimination. It is helpful also to understand the statutory scheme in which these provisions are to be found. Sections 4742(a) and 4744(a) are part of a complex, interrelated system for taxing the transfer of marihuana. Those who deal in marihuana are required by section 4751 of Title 26 to pay a special annual occupational tax and are required to register under section 4753. Section 4742(a), which defendant is charged with violating, makes it unlawful for any person, whether or not required to pay the special tax imposed by section 4751 and to register under section 4753, to transfer marihuana except pur-

suant to a written order of the transferee on a form issued for that purpose by the Secretary of the Treasury or his delegate. Section 4742(b) excepts from this requirement, however, transfers to patients by physicians, dentists, veterinary surgeons, and other practitioners registered under section 4753; transfers pursuant to a written prescription of a physician, dentist, veterinary surgeon or other practitioner registered under section 4753; certain exports of marihuana under specified conditions; transfers to government and state officials; and transfers of the seeds of the plant from which marihuana is produced to any person registered under section 4753. Section 4742(c) provides that the Secretary or his delegate is to make the forms available for sale and that whenever a form is sold the Secretary or his delegate is to record the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered on the form before delivering it to the proposed transferee. Section 4742(d) provides that the original order form is to be given by the transferee to the transferor and retained by the transferor for a period of two years; that a copy is to be retained by the transferee for a period of two years; that a copy is to be preserved in the records of the internal revenue district; and that either of the copies is to be admissible in evidence as an original. Section 4773 provides that the original and copies are to be open for inspection to federal, state, and local officials and that the Secretary of the Treasury or his delegate is authorized to furnish upon written request and payment of a minimal fee certified copies of the order forms on file to federal, state, and local officials. A tax is imposed by section 4741(a) on all transfers of marihuana which are required by Section 4742 to be carried out pursuant to a written

order form. Persons who have paid the special tax imposed by section 4751 and registered under section 4753 are assessed a transfer tax at the rate of $1 per ounce. Those who have paid the tax imposed by section 4751 and registered under section 4753 are assessed a transfer tax at the rate of $100 per ounce. The transfer tax is to be paid by the transferee at the time he obtains the order form, but if the transfer is made in violation of section 4742(a) without an order form and without payment of the transfer tax, the transferor also becomes liable for the tax, section 4741(b). Section 4744(a), which defendant is charged with violating, makes it unlawful for a person who is a transferee required to pay the tax imposed by section 4741(a) to acquire or obtain marihuana without payment of the tax or to transport or conceal or facilitate the transportation or concealment of any marihuana so acquired or obtained.

In *Leary* v. *United States, supra,* the Supreme Court concluded that these provisions, read according to their terms, require an illegal transferee of marihuana to expose himself to a "real and appreciable" [1] risk of self-incrimination since sections 4741 and 4742 require him in the course of obtaining an order form to identify himself as a transferee of marihuana who has not registered and paid the occupational tax under sections 4751–4753 and since section 4773 directs that this information should be conveyed to state

[1] The quoted language has its origin in *Reg.* v. *Boyes*, 1 B & S 311, 330 (1861). See also *Brown* v. *Walker*, 161 U.S. 591, 599, 16 S. Ct. 644, 40 L. Ed. 819 (1896); *Rogers* v. *United States*, 340 U.S. 367, 374, 71 S. Ct. 438, 95 L. Ed. 344 (1951); *Marchetti* v. *United States*, 390 U.S. 39, 48, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968); *Grosso* v. *United States*, 390 U.S. 62, 67, 88 S. Ct. 709, 19 L. Ed. 2d 906 (1968); *Haynes* v. *United States*, 390 U.S. 85, 97, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968).

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and local law enforcement officials on request. *Leary* v. *United States, supra,* at 4399. In addition, since the possession of marihuana is a crime in every state,[2]

[2] See e.g. Ala. Code Tit. 22, §§ 232–258 (1958); Alaska Stat. §§ 17.10.010–17.10.240 (1962); Ariz. Rev. Stat. §§ 36–1001 to 36–1024 (1956); Ark. Stat. §§ 82–1001 to 82–1024 (1947); Cal. Health and Safety Code §§ 11001–11853 (1964); Colo. Rev. Stat. §§ 48–5–1 to 48–5–21 (1963); Conn. Gen. Stat. §§ 19–443 to 19–504 (1968); Del. Code Ann., Tit. 16 §§ 4701–4722 (1967); D.C. Code §§ 33–401 to 33–425 (1967); Fla. Stat. Ann. §§ 398.01–398.24 (1960); Ga. Code Ann. §§ 42–801 to 42–822, 42–917 to 42–919 (1957); Hawaii Rev. Laws §§ 52–10 to 52–39 (1955); Idaho Code §§ 37–2701 to 37–2723 (1967); Ill. S.H.A. c. 38 §§ 22–1 to 22–49 (1964); Ind. Stat. Ann. §§ 10–3519 to 10–3552 (1956); Iowa Code Ann. §§ 204.1–204.23 (1968); Kan. Stat. Ann. §§ 65–2501 to 65–2522 (1963); Ky. Rev. Stat. §§ 218.010–218.240 (1962); La. Stat. Ann. §§ 40:061–40:984 (1965); Me. Rev. Stat. Ann., Tit. 22 §§ 2361–2380 (1964); Md. Ann. Code, Art. 27, §§ 276–306 (1957); Mass. Ann. Laws c. 94 §§ 197–217 (1954); Mich. Stat. Ann. §§ 18.1071–18.1098 (1961); Minn. Stat. Ann. §§ 618.01–618.25 (1964); Miss. Code Ann. §§ 6844–6869 (1942); Mo. Rev. Stat. §§ 195.101–195.270 (1959); Mont. Rev. Codes Ann. §§ 54–101 to 54–128 (1947); Neb. Rev. Stat. §§ 453.010–453.240 (1967); N.H. Rev. Stat. Ann. §§ 318–A:1 to 318–A:26 (1966); N.J. Stat. Ann. §§ 24:18–24:48 (1940); N.M. Stat. Ann. §§ 54–7–1 to 54–751 (1953); New York Public Health Law §§ 3300–3354 (McKinney's) (1953); N.C. Gen. Stat. §§ 90–86 to 90–113 (1965); N.D. Cent. Code Ann. §§ 19–03–1 to 19–03–32 (1960); Ohio Rev. Code §§ 3719.01–3719.36, 3719.99 (1953); Okla. Stat. Ann., Tit. 63 §§ 466–469A (1963); Ore. Rev. Stat. 474.010–474.990 (1967); Pa. Stat. Ann. Purdon, Tit. 35 §§ 780–1 to 780–31 (1964); R.I. Gen. Laws §§ 21–28–1 to 21–28–67 (1956); S.C. Code of Laws §§ 32–1461 to 32–1495 (1962); S.D. Code §§ 22.1301–22.1324 (1939); Tenn. Code Ann. §§ 52–1301 to 52–1323 (1966); Vernon's Ann. Tex. Pen. Code Art. 725b (1961); Utah Code Ann. §§ 58–13a–1 to 58–13a–48 (1953); Vt. Stat. Ann., Tit. 18, §§ 4201–4225 (1968); Va. Code Ann. §§ 54–487 to 54–519 (1950); Wash. Rev. Code §§ 69.33.220–69.33.960 (1959); W. Va. Code Ann. §§ 16–8A–1 to 16–8A–26 (1966); Wis. Stat. Ann. §§ 161.25 (1957); Wyo. Stat. Ann., §§ 35–348 to 35–371 (1957).

and since those who might legally possess marihuana under state law are virtually certain to be registered under section 4753 or to be exempt from the order form requirement, the Supreme Court concluded that "the class of possessors who are both unregistered and obliged to obtain an order form constitute 'a select group inherently suspect of criminal activities' ". *Leary* v. *United States, supra,* at 4400. (Quoting from *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79 (1965).)

It is clear from the statutory scheme and the discussion in *Leary* v. *United States, supra,* that the danger of self-incrimination inherent in the transfer tax requirement arises primarily from the written order form requirement for it is the order form which elicits and preserves the incriminating information. Therefore, it appears that a prosecution for transferring marihuana not pursuant to a written order form in violation of section 4742(a) is as vulnerable to a timely assertion of the privilege against self-incrimination as is a prosecution for being a transferee of and transporting and facilitating the transfer of marihuana without having paid the transfer tax imposed by section 4741(a), in violation of section 4744(a).

Nevertheless, the government contends that a prosecution for violation of section 4742(a) is not vulnerable to a timely assertion of the privilege against self-incrimination. The government relies primarily on *United States* v. *Minor,* 398 F.2d 511 (2d Cir. 1968) cert. granted 37 U.S.L.W. 3458 (U.S., June 2, 1969), which held that the privilege against self-incrimination does not afford a defense to a prosecution for selling narcotics without the written order form required by 26 US.C. § 4705(a).

A possible distinction between the assertion of the privilege against self-incrimination as a defense to a

prosecution for violation of section 4742(a) and as a defense to a prosecution for violation of section 4744(a) is the defendant's standing to assert the privilege. In *United States* v. *Minor, supra,* a similar problem of standing with respect to the assertion of the privilege in defense to a prosecution for transfer of narcotics without the required order form in violation of section 4705(a) was discussed. The court there concluded that compliance with section 4705(a) considered *in vacuo* would not have subjected defendant to a risk of self-incrimination. The order form, pursuant to which marihuana is to be transferred, is to be obtained by the transferee. Since the privilege against self-incrimination is a personal one, see *e.g., United States* v. *Minor, supra* at 513, the question arises whether the transferor can assert the privilege when it is the transferee who is required to obtain the prescribed form. Section 4742(c) provides that at the time the form is sold, the name and address of the proposed vendor, as well as the date of sale, the name and address of the purchaser and the amount of marihuana ordered is to be made to appear on the order form. The transferor is thus placed in a position of either requiring that the transferee enter information on the form which will incriminate the transferor or violating section 4742(a). The assertion of the privilege by the transferor is, therefore, an assertion on behalf of himself not merely on behalf of the transferee. Accordingly, I conclude that the transferor has standing to assert the privilege against self-incrimination as a defense to a prosecution for violation of section 4742(a). *United States* v. *Minor, supra,* is distinguishable in this regard in that the order form provision of section 4705(a) does not require the name and address of the transferor to be

placed on the order form. Nor does 26 C.F.R. § 151,185 dealing with this section require such information. The only information required is the size and number of packages and the date of sale.

The motion to dismiss both counts of the indictment is hereby granted.

Entered this 30th day of June, 1969.

By the Court:

JAMES E. DOYLE,
District Judge.

APPENDIX B

In the United States District Court for the Western District of Wisconsin

No. 67-CR-43

UNITED STATES OF AMERICA, PLAINTIFF

v.

DON C. O'NEAL, DEFENDANT

[Filed July 16, 1968. John R. Adams, clerk]

Opinion and Order

The government has filed a petition for reconsideration of an opinion and order entered herein on June 30, 1969, granting defendant's motion to dismiss both counts of an indictment charging him with violations of the Marihuana Tax Act, 26 U.S.C. § 4741 et seq.

Count I of the indictment charged that defendant transferred a quantity of marihuana not pursuant to a written order on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, in violation of 26 U.S.C. § 4742(a). Count II of the indictment charged that defendant was a transferee of and transported and facilitated the transfer of a quantity of marihuana without having paid the tax imposed by 26 U.S.C. § 4741(a), in violation of 26 U.S.C. § 4744(a). Defendant's motion to dismiss both counts of the indictment was granted on the ground that the timely assertion of his privilege against self-incrimination under the Fifth Amend-

ment to the Constitution of the United States is a complete defense to the charges in the indictment.

With respect to Count II of the indictment which charges a failure to pay the transfer tax in violation of section 4744(a), the outcome is controlled by the decisions of the United States Supreme Court in *Leary* v. *United States,* 37 U.S.L.W. 4397 (U.S., May 19, 1969), and *United States* v. *Covington*, 37 U.S.L.W. 4412 (U.S., May 19, 1969). The government contends, however, that with respect to the privilege against self-incrimination, a prosecution for transferring marihuana not pursuant to a written order form, in violation of section 4742(a), is distinguishable from a prosecution for failure to pay the transfer tax, in violation of section 4744(a). The government asserts that the obtaining of a written order form by the transferee is at most an indication that the transferor intends to transfer marihuana illegally; that the transferor has until the time of the actual transfer an option not to transfer marihuana illegally; and that, therefore, the transferor's Fifth Amendment rights are not violated by the written order form requirement. In addition, the government directs the court's attention to two recent decisions. In *United States* v. *Buie,* 407 F. 2d 905 (2d Cir. 1969), cert. granted 37 U.S.L.W. 3493 (U.S., June 23, 1963), a timely assertion of the privilege against self-incrimination was held not to constitute a defense to a prosecution for violation of section 4742(a). In *United States* v. *Lawler,* —— F. 2d —— (7th Cir., July 10, 1969), a timely assertion of the privilege against self-incrimination was held not to constitute a defense to a prosecution for transferring narcotics not pursuant to a written order form in violation of section 4705(a).

The government's contention that a prosecution for violation of section 4742(a) is distinguishable from a prosecution for violation of 4744(a) because at most the written order form is an indication that the transferor intends to transfer marihuana illegally, which intention may be revoked prior to the actual time of transfer, is not persuasive. Section 4741(b) provides that the transfer tax shall be paid by the transferee at the time he secures the written order form. It is the written order form which elicits and preserves incriminating information. Therefore, the transferee is in no different position than the transferor with respect to having a possibility of revoking an intention to acquire marihuana illegally. Mere possession of marihuana constitutes a crime in every state (see statutory authority collected in footnote 2 of the opinion and order entered herein on June 30, 1969). It appears that the transferee has an even longer period of time than the transferor to revoke his intention to possess marihuana since the transferor must necessarily acquire possession of the marihuana to be transferred prior to the transfer and the transferee's acquisition of the marihuana.

In *United States* v. *Buie*, *supra*, on which the government relies, the court relied on *United States* v. *Minor*, 398 F. 2d 511 (2d Cir. 1968) cert. granted 37 U.S.L.W. 3458 (U.S., June 2, 1969), which held that the privilege against self-incrimination was not available as a defense to a prosecution under section 4705(a) for the transfer of narcotics not pursuant to a written order form. In the opinion and order entered herein on June 30, 1969, I concluded that, with respect to the privilege against self-incrimination, a prosecution for violation of section 4742(a) is distinguishable from a prosecution for a violation of 4705(a). Section 4742(c) provides that at the time

the form is sold, the name and address of the proposed vendor, as well as the date of sale, the name and address of the purchaser and the amount of marihuana ordered must be made to appear on the written order form. Section 4705, however, does not require the name and address of the transferor to be placed on the order form. 26 C.F.R. § 151.185 dealing with this section requires only that the size and number of packages and the date of sale must be made to appear on the written order form. Although 26 C.F.R. § 151.201 requires the transferor to write his name on the written order form and forward a triplicate copy to the narcotic district supervisor, this is not done until after the transaction is completed, and, therefore, the transferor can comply with the literal requirements of section 4705(a) without providing incriminating information.

With respect to *United States* v. *Bair*, *supra*, it should initially be observed that this decision was rendered prior to the Supreme Court's decisions in *Leary* v. *United States*, *supra*, and *United States* v. *Covington*, *supra*. Moreover, at least one pillar of *Bair* appears to have been undermined by *Leary* and *Covington*. In *Bair*, the court concluded that section 4742(a) was not aimed at a class "inherently suspect of criminal activities", *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79 (1965). In *Leary*, however, the Supreme Court concluded that under the Marihuana Tax statutory scheme persons required to pay the transfer tax constitute a class "inherently suspect of criminal activities". Section 4741(a) imposes the transfer tax on all transfers of marihuana which are required by section 4742 to be carried out pursuant to a written order form. Consequently all transactions for which a transfer tax is required are also transactions for which a written order form is

required. Accordingly, if transferees required to pay the transfer tax are members of a class "inherently suspect of criminal activity", so also are transferors who are required to transfer marihuana pursuant to a written order form members of such a class.

In *Buie* the court concluded that since it is the transferee who places the incriminating information on the order form rather than the transferor, the transferor "cannot benefit from the privilege allegedly available to the [transferee]". 407 F. 2d at 907 (quoting from *United States* v. *Minor*, *supra* at 513). The court further concluded that the case of the transferor and the written order form requirement of section 4742(a) "is conceptually no different from a prosecution based on incriminatory admissions voluntarily made to a police informant". *Id.* (citing *Hoffa* v. *United States*, 385 U.S. 293, 304, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966)).

I am unable to agree with the reasoning of the court in *Buie*. The court asserted that if the transferor were required to write his name on the written order form or if the transferor and transferee were each required to write his name on the written order form, the transferor's privilege against self-incrimination would be violated. I am unable to distinguish those situations from the dilemma posed for the transferor by section 4742(a). The transferor is placed in the position of either requiring that the transferee enter information on the form which will incriminate the transferor or violating section 4742(a). The section thus requires the transferor to see to it that incriminating information is provided to the authorities. It is irrelevant whose hand actually places the information on the form. The privilege against self-incrimination could be easily eroded if it could be circumvented by requiring a person to provide incriminating information to

the government by means of a third party. It is noteworthy in this respect that the transfer tax requirement involved in *Leary* and *Covington* does not require the transferee to provide incriminating information directly to state and local authorities by whom he is in danger of being prosecuted. It merely requires him to furnish information to federal authorities which may incriminate him as to a state or local offense and requires the federal authorities to furnish this information to state and local authorities upon request.

Finally, the analogy suggested in *Buie* to incriminatory admissions voluntarily made to a police informant is unpersuasive. In the section 4742(a) situation, the government requires that the information be provided; it is the element of voluntariness which is lacking. In *Hoffa*, upon which the *Buie* court relied in making its comment, the Supreme Court emphasized the voluntary character of the statements made.

United States v. *Lawler, supra,* relied upon by the government, followed *United States* v. *Minor, supra,* in holding that the privilege against self-incrimination is not available as a defense to a prosecution for transfer of narcotics not pursuant to a written order form in violation of section 4705(a). I conclude that *United States* v. *Lawler, supra,* is distinguishable from the present case for the same reasons that I have concluded that *United States* v. *Minor, supra,* is distinguishable. Nothing in the *Lawler* opinion dictates a different result here. In fact a careful reading of that opinion appears to support the view that the privilege against self-incrimination is available as a defense to a prosecution for violation of section 4742(a). In reaching its conclusion with respect to section 4705(a), the court in *Lawler* explained:

> "As pointed out [in *United States* v. *Minor, supra*], the statute only prohibits the sale of narcotics to a purchaser who has not obtained an order form from the Treasury Department. Despite the serious hazard of self-incrimination to which the purchaser may be exposed in complying with such a requirement (see *Leary* v. *United States*, ——— U.S. ——— ———), a seller in Lawler's position may not complain of a theoretical violation of the purchaser's rights. Defendant has not brought to the court's attention any regulations *which would require the seller of narcotics to participate in or insure his own incrimination through the order form requirement*, but to the extent that any regulation might jeopardize the constitutionality of section 4705(a) the regulation would have to give way in order that the statute may be saved. Cf. *Leary* v. *United States*, ——— U.S. ——— ———." *United States* v. *Lawler, supra*, advance sheet opinion at page 6. (Emphasis added.)

I conclude that because of the requirement of section 4742(c) that at the time the written order form is obtained the name and address of the proposed vendor must be made to appear on the form, a copy of which is to be preserved in the records of the internal revenue district, section 4742(a) requires the transferor to "insure his own incrimination".

I adhere to the determination in the opinion and order entered herein on June 30, 1969, that the timely assertion of the privilege against self-incrimination constitutes a complete defense to a prosecution for violation of section 4742(a) as well as 4744(a).

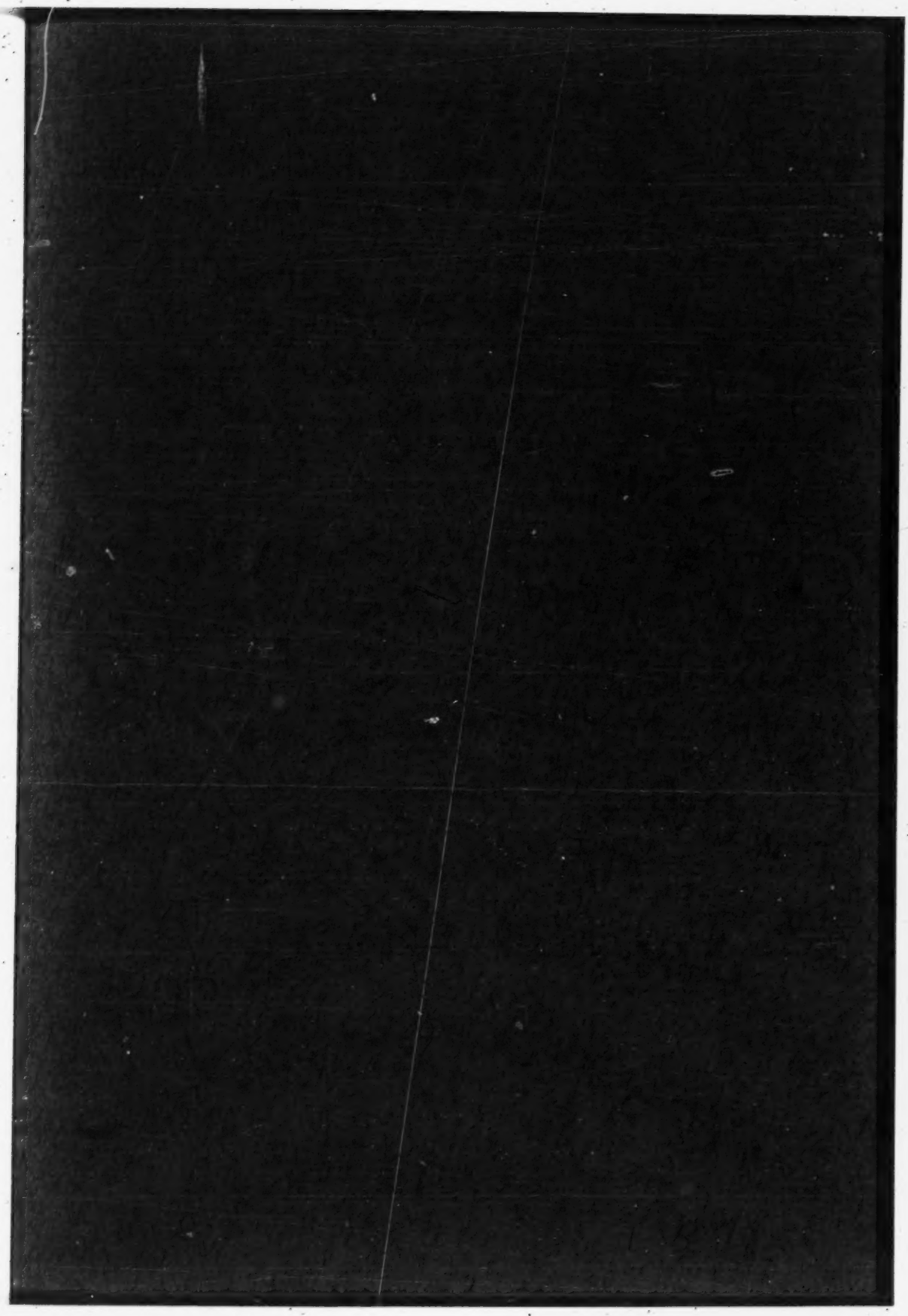
For the reasons set forth above the petition for reconsideration is hereby denied.

Entered this 16th day of July, 1969.

By the Court:

JAMES E. DOYLE,
District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1969



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 742

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD SIMON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

DEFENDANT'S RESPONSE TO JURISDICTIONAL STATEMENT

MC MANUS and HAUKOM
Attorneys for Defendant
232 King Street
Madison, Wisconsin 53703

IN THE

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JURISDICTION

Defendant concedes that plaintiff is correct in stating that the present case meets the pre-requisites of 18 U.S.C. 3731.

BUIE SHOULD BE RECONSIDERED

Defendant here argued in the District Court that the seller was placed in the position of selling contrary to Section 4742 or demanding that buyer obtain the form placing information thereon that would incriminate the seller. The District Court held that this would indeed violate the Fifth Amendment privilege of the seller.

The Court held in Leary that the buyer could claim the Fifth Amendment privilege because he was placed in the position of violating the Federal marijuana tax act or supplying information on the form which would expose his violation of state criminal statutes. In Buie the Court said that the seller was not placed in the same dilemma because the buyer would not procure the form under any circumstances anyway.

It would appear to the defendant here that if the Court's rationale in Buie is to stand that the underpinnings of Leary fall because the buyer in Leary was not faced with a dilemma either due to the fact that he would not under any circumstances obtain the required order form.

CONCLUSION

Therefore, defendant would request that the Court reconsider the decision rendered in Buie and not dispose of the present case in accordance with the Buie decision.

MC MANUS and HAUKOM
Attorneys for Defendant
232 King Street
Madison, Wisconsin 53703

March, 1970